



Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at <http://about.jstor.org/participate-jstor/individuals/early-journal-content>.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

CONSTITUTIONAL LAW IN 1918-1919. I
THE CONSTITUTIONAL DECISIONS OF THE SUPREME COURT OF
THE UNITED STATES IN THE OCTOBER TERM, 1918¹

THOMAS REED POWELL

Columbia University

I. INTERSTATE COMMERCE

POWERS OF CONGRESS UNDER THE COMMERCE CLAUSE

United States v. Hill² by a vote of seven to two sustained the so-called Reed Amendment by which Congress prohibited the introduction of liquor into any state which forbade the sale or manufacture of liquor within its borders. West Virginia, though interdicting manufacture and sale, allowed any person to bring into the state for personal use a quart of liquor each month. Since Mr. Hill did only what West Virginia sanctioned, Mr. Justice McReynolds for himself and Mr. Justice Clarke insisted that "the Reed Amendment in no proper sense regulates interstate commerce, but is a direct intermeddling with the state's internal affairs." He inquired rhetorically: "If Congress may deny liquor to those who live in a state simply because its manufacture is not permitted there, why may not this be done for any suggested reason, e.g. because the roads are bad or men are hanged for murder or coals are dug. Where is the limit?" For the majority Mr. Justice Day answered that the control of Congress over interstate commerce is not limited by state laws and that "the policy of Congress acting independently of the states may induce legislation without reference to the particular policy or law of any given state." Congress may exert its authority in view of the laws of the state or inde-

¹ For reviews of decisions in previous terms see *American Political Science Review* (1910) IV, 483-487; (1912) VI, 513-523; (1915) IX, 36-49; (1918) XII, 17-49, 427-457, 640-666; (1919) XIII, 47-77, 229-250.

² (1919) 248 U. S. 420, 39 Sup. Ct. 143. See R. E. Cushman, "The National Police Power under the Commerce Clause of the Constitution," 3 *Minnesota Law Review* 381, 409-411. See also 19 *Columbia Law Review* 79, 32 *Harvard Law Review* 733, 17 *Michigan Law Review* 511, and 28 *Yale Law Journal* 501.

pendently of those laws. This hardly answers the dissenting query of Mr. Justice McReynolds. There must be some limit to the power of Congress to make its prohibitions of interstate commerce dependent upon legislation in the state of destination where the congressional prohibition is not in furtherance of that state legislation. The sound basis for the decision must be the reasonableness of the relation between the congressional prohibition and the state laws upon which it is made contingent.³

There was division of opinion also in *United States v. Ferger*⁴ in which all the court but Mr. Justice Pitney thought it within the power of Congress to punish the counterfeiting and use of a fictitious interstate bill of lading, even though such bill related to no actual or contemplated commerce. The decision of the district court dismissing the indictment was said by the Chief Justice to assume mistakenly "that the power of Congress is to be necessarily tested by the intrinsic existence of commerce in the particular subject dealt with, instead of by the relation of that subject to commerce and its effect upon it." The power of Congress under the commerce clause and the necessary-and-proper clause must include authority to deal with obstructions to interstate commerce "and with a host of other acts which, because of their relation to and influence upon interstate commerce, come within the power of Congress to regulate, although they are not interstate commerce in and of themselves." The undoubted power to regulate genuine interstate bills of lading carries with it the power to prevent the fraudulent and spurious imitation and thus to guard against impairing or weakening the credit and confidence which sustains interstate commerce.

In three cases it was held that an injured employee was engaged in interstate commerce so as to come within the federal Employers' Liability Act. *New York Central Railroad Co. v. Porter*⁵ involved a section man who was hit by a passing train while shoveling snow between platform and tracks used for both interstate and intrastate

³ In interpreting the Reed Amendment the principal case declined to limit its scope to the introduction of liquor for commercial purposes. In *United States v. Gudger*, (1919) 249 U. S. 373, 39 Sup. Ct. 323, the statute was held not applicable to liquor in transit through a dry state to a wet one. See 28 *Yale Law Journal* 836. See also *Danziger v. Cooley*, (1919) 248 U. S. 310, 39 Sup. Ct. 119.

⁴ (1919) 250 U. S. 199, 39 Sup. Ct. 445. The same point is affirmed in another case between the same parties decided the same day, 250 U. S. 207, 39 Sup. Ct. 447. See 32 *Harvard Law Review* 557.

⁵ (1919) 249 U. S. 168, 39 Sup. Ct. 188. Mr. Justice Clarke dissents.

commerce. *Kinzell v. Chicago, M. & St. P. Ry. Co.*⁶ had to do with a workman who was keeping a track clear for interstate trains by removing from a trestle the earth which accumulated above the tracks in the process of substituting a solid embankment for the trestle. In *Philadelphia, B. & W. R. Co. v. Smith*,⁷ the injured workman was a cook in a camp car run for the accommodation of a gang of bridge carpenters engaged in repairing bridges over which interstate trains were run. The carpenters were regarded as essential to the commerce over the bridge, and the cook was thought to be essential to the carpenters in the prosecution of their work and not a mere minister to their personal convenience.

In *United Drug Co. v. Rectanus Co.*,⁸ Mr. Justice Pitney reiterated the well-established principle that the power of Congress to legislate on the subject of trade-marks is only such as arises from the authority conferred by the commerce clause and that registration of a trade-mark under the Act of Congress has no bearing on a controversy with respect to alleged infringement in exclusively local trade.

Though the controversy over the federal Meat Inspection Act which came before the court in *Pittsburgh Melting Co. v. Totten*⁹ appeared to be confined to a question of interpretation, Mr. Justice Day declared, without citation of authority, that "the enactment of the statute was within the power of Congress in order to prevent interstate and foreign shipment of impure or adulterated meat-food products." The act "provides an elaborate system of inspection of animals before slaughter, and of carcasses after slaughter and of meat-food products" prepared for interstate or foreign commerce, requires that products condemned by the federal inspectors "shall be destroyed for food purposes," and forbids transportation in interstate or foreign commerce of products which have not been inspected and approved.¹⁰

⁶ (1919) 250 U. S. 130, 39 Sup. Ct. 412.

⁷ (1919) 250 U. S. 101, 39 Sup. Ct. 396.

⁸ (1918) 248 U. S. 90, 39 Sup. Ct. 48. It is not clear that the principle asserted in this opinion was essential to the disposition of the controversy.

⁹ (1918) 248 U. S. 1, 39 Sup. Ct. 3.

¹⁰ In *Carey v. South Dakota*, (1919) 250 U. S. 118, 39 Sup. Ct. 403, an opportunity was presented to pass on the constitutionality of the federal Migratory Bird Act which has been disapproved by several of the lower federal courts, but the Supreme Court, by interpreting the provision that all birds of the designated kind which do not remain permanently within any one state are to be deemed within the custody of the United States as not precluding the operation of a state statute forbidding the shipment of dead birds, found it unnecessary

THE COMMERCE CLAUSE AND THE POWERS OF THE STATES

A. State Taxation and Interstate Commerce

Two cases presented applications of the familiar principle that the state may in the absence of pertinent legislation by Congress require the inspection of dangerous products which have not yet ceased to be articles of interstate commerce and may charge a reasonable fee therefor, but must not make the fee so high that the law partakes of the nature of a revenue measure and thus becomes an unconstitutional regulation of interstate commerce. In *Pure Oil Co. v. Minnesota*¹¹ the state was given a clean bill of health because it appeared that the

to consider whether Congress had exceeded its powers. The opinion of Mr. Justice Brandeis may be taken as a hint that the federal statute will be sustained to the extent that it forbids migratory birds to be destroyed or taken contrary to federal regulations, for one of the reasons adduced in support of thus limiting the scope of the statute is the familiar canon of construction that "where a statute is reasonably susceptible of two interpretations, by one of which it would be clearly constitutional and by the other of which its constitutionality would be doubtful, the former construction should be adopted."

In *Sandberg v. McDonald*, (1918) 248 U. S. 185, 39 Sup. Ct. 84 (see 28 *Yale Law Journal* 403), the Seamen's Act was by a vote of five to four interpreted as not intending to include advancement to sailors in foreign ports in a provision forbidding the deduction of wages advanced from the sum due for past services. The minority, consisting of Justices McKenna, Holmes, Brandeis and Clarke, recognized that their construction of the statute made the question of the constitutionality of the statute "not only of ultimate but of first insistence," but it passed it by for the reason that it had not been duly certified by the Circuit Court of Appeals. The majority prefaced its examination of the question of interpretation by saying: "Conceding for the present purpose that Congress might have legislated to annul such contracts as a condition upon which foreign vessels might enter the ports of the United States" thus inviting the assumption that federal control of foreign commerce is sufficiently extensive to sanction the constitutionality of the statute as interpreted by the minority. The Sandberg Case involved a British ship. In *Neilson v. Rhine Shipping Co.*, (1918) 248 U. S. 205, 39 Sup. Ct. 89 (see 28 *Yale Law Journal* 403), the act was held not to apply to extra-territorial payments by an American ship, the same four justices dissenting.

In *Louisville & Jeffersonville Bridge Co. v. United States*, (1919) 249 U. S. 534, 39 Sup. Ct. 355, the Safety Appliance Act was held to apply to a movement of twenty-six cars three quarters of a mile in a terminal yard. The bridge company contended that it was engaged in a mere switching of cars and not a "train movement" within the meaning of the act, but does not appear to have contested the constitutionality of the application of the statute successfully urged by the government.

¹¹ (1918) 248 U. S. 158, 39 Sup. Ct. 35.

latest report showed that over seventy-five per cent of the receipts were used for departmental expenses and that in addition the general officers of the state had not a little to do with the enforcement of the statute. Weight was also given to the fact that the state had from time to time reduced the fees when experience had shown that they yielded more than the cost of inspection. In *Standard Oil Co. v. Graves*,¹² however, the state of California had made a net profit of about \$250,000 during the decade when the law had been in force and the receipts for the last preceding year were nearly ten times the disbursements, and it was therefore held that the law was substantially a revenue measure and unconstitutional as a direct burden on interstate commerce.

A similar excess of pecuniary zeal was discovered by *Union Pacific R. Co. v. Public Service Commission of Missouri*¹³ in Missouri's scale of fees for certificates from the public service commission authorizing the issue of bonds by railroads, where the bonds were secured by mortgage of property within the state. The fee was graduated according to the size of the issue, and by the provisions of the statute failure to pay the fee subjected the mortgagor to penalties and invalidated the bonds. The state court had held that as the application for the certificate was voluntary the company was estopped to decline to pay the statutory compensation, and it was therefore contended on behalf of the state that the case presented no federal question. But the Supreme Court found that the certificate was a commercial necessity and that the payment was under duress and that the constitutionality of the requirement was therefore in issue. The state had imposed a charge of \$10,962.25 for an issue of \$31,848,900 by a Utah corporation which had in Missouri property valued at a little more than \$3,000,000 out of a total of over \$281,000,000, and less than a mile of main track out of a total of over 3500 miles. Of the expenditures for which the bonds were issued, less than \$125,000 had been made in Missouri. The Missouri business of the complaining foreign corporation was exclusively interstate. The company contested the charge under the due-process clause of the Fourteenth Amendment as well as under the commerce clause, but the decision of the Supreme Court was based entirely on the commerce clause, no mention being made of the Fourteenth Amendment. The reliance of the court on

¹² (1919) 249 U. S. 389, 39 Sup. Ct. 320.

¹³ (1918) 248 U. S. 67, 39 Sup. Ct. 24. See 32 *Harvard Law Review* 579 and 28 *Yale Law Journal* 291.

Looney v. Crane Co.¹⁴ and International Paper Co. v. Massachusetts¹⁵ shows that the decision would have been the same even if the company had done local as well as interstate commerce in Missouri, and that the Supreme Court intends to apply to fees for special acts the same principles or practices which have been worked out with respect to annual excises on foreign corporations.

The Looney case was relied on unsuccessfully by the complainant in American Mfg. Co. v. St. Louis¹⁶ who did not relish a license tax on manufacturers assessed at one dollar for each \$1000 of sales and complained particularly of such part of the tax as was measured by sales of goods removed from the factory to another state before sale. The crucial issue in the case was whether the tax was on the sales or on the manufacture. The Supreme Court followed the state court in holding that it was the manufacture and not the sales that subjected the company to taxation and declared that, since the city might have measured the tax by the value of the goods at the time and place of manufacture and compelled payment of the tax then and there, the manufacturer could not complain because payment was postponed until sale. The state court had held that the tax did not apply to sales of goods not manufactured within the taxing jurisdiction. Mr. Justice Pitney is probably justified in saying that the Looney case and Crew Levick Co. v. Pennsylvania¹⁷ "are so obviously distinguishable that particular analysis is unnecessary," yet it is evident that commercial transactions outside the state of manufacture contributed somewhat to the amount of the tax. This element was dealt with by declaring that the tax produces no direct burden on interstate commerce, but "only the same kind of incidental and indirect effect as that which results from the payment of property taxes or any other general contribution to the cost of government."

Another covert attempt to extract an unconstitutional tribute from interstate commerce was charged by the complainant in Postal Telegraph-Cable Co. v. Richmond,¹⁸ but was not sustained by the court. One of the matters in issue was a \$300 license tax on local business. It was contended that the cost of doing the local business was greater than the net receipts from it, and that, as the company was not free

¹⁴ (1917) 245 U. S. 178, 13 *American Political Science Review* 53.

¹⁵ (1918) 246 U. S. 135.

¹⁶ (1919) 250 U. S. 459, 39 Sup. Ct. 522.

¹⁷ (1917) 245 U. S. 292, 13 *American Political Science Review* 55.

¹⁸ (1919) 249 U. S. 252, 39 Sup. Ct. 265.

to decline local business, the tax was necessarily on interstate commerce. Mr. Justice Clarke stated that "if the facts were as thus asserted it might well be that this tax would be invalid," but the evidence as to the unremunerative character of the local business failed to convince the court and the tax was therefore sustained. It was declared that the tax was not an inspection measure which must be limited to the cost of supervising the business, but "an exercise of the police power of the state for revenue purposes"—a hybrid locution which seems to blur the distinction between police and fiscal measures which has previously been regarded as significant.

The same case sustained another tax of two dollars for each pole maintained or used within the city. This, too, was called an "exercise of the police power" to exact a compensation in the nature of rental for the use of the streets. It was declared that even if the tax had to be paid from interstate earnings, "this alone would not be conclusive against its validity," since "even interstate business must pay its way—in this case for the right of way and the expense to others incident to the use of it." Enough consideration was given to the evidence as to the cost of inspecting and supervising the lines within the city to indicate that the charge might possibly have been successfully complained of if imposed as rental only.

Another so-called "pole tax" came before the court in *Mackay Telegraph & Cable Co. v. Little Rock*¹⁹ and was also sustained. The tax was levied at fifty cents per pole, and the company resisted only that part which was levied on poles not on the streets of the city but on a railroad right of way. This was said to be not sufficient to condemn it, "especially in view of the finding of the Supreme Court of Arkansas that the telegraph line as laid along the right of way crosses a street car line and several turnpikes coming into the city, and that it is necessary there shall be local governmental supervision of the lines crossing these highways for the protection of travelers upon them."

The substantial issue in *Wells Fargo & Co. v. Nevada*²⁰ was whether a state tax on an express company assessed at \$300 per mile of line over which it did business was imposed on the property or on the privilege or franchise. The assessor had described the property as consisting of the right to carry on the business, but the Supreme Court agreed with the state court that this was a mistake and that under the statute what was being taxed was the company's personal property, tangible

¹⁹ (1919) 250 U. S. 94, 39 Sup. Ct. 428

²⁰ (1918) 248 U. S. 165, 39 Sup. Ct. 62.

and intangible. "The difference," says Mr. Justice Van Devanter, "is vital, for, consistently with the commerce clause of the federal Constitution, the state could not tax the privilege or act of engaging in interstate commerce, but could tax the company's property within the state, although chiefly employed in such commerce." The company also alleged that "the state board in valuing the property acted on inaccurate data and applied erroneous standards which resulted in a valuation so excessive as to make the tax a burden on interstate commerce," but the Supreme Court did not find the allegation supported by the evidence.

The willingness of the Supreme Court to make the inquiry just referred to indicates that an excessive valuation of property employed in interstate commerce is a violation of the commerce clause, even though the property does not travel from one state to another. *Union Tank Line v. Wright*²¹ establishes the principle firmly as to peripatetic property. The Union Tank Line had in Georgia through the taxable year an average of fifty-seven cars which were admittedly worth as separate items of property not more than \$47,310. By taking that proportion of the total personal property of the company which the number of miles over which cars were run in Georgia bore to the total number of miles over which they were run, the Georgia property was assessed at \$291,196. This assessment, the minority of the court, consisting of Justices Pitney, Brandeis and Clarke, were moved to sustain, contending that controversy was foreclosed by *Pullman's Car Co. v. Pennsylvania*.²² The majority insisted that the declarations from the Pullman case relied on by the minority related to a matter not in issue and were therefore *obiter*. They conceded that the valuation of the property in Georgia need not be limited to the mere worth of the articles separately considered but may include the intangible value due to the organic relation of the property in the state to the whole system. The minority thought that the actual value of the property so conceived was so difficult of ascertainment that the rule adopted and applied was sufficiently accurate to satisfy the Constitution. With this the majority disagreed, insisting that the rule adopted had no necessary relation to the real value and was so arbitrary and the consequent valuation so excessive that it must be condemned because of conflict with both the commerce clause and the Fourteenth

²¹ (1919) 249 U. S. 275, 39 Sup. Ct. 276. See 19 *Columbia Law Review* 334, 3 *Minnesota Law Review* 421, and 28 *Yale Law Journal* 802.

²² (1891) 141 U. S. 18.

Amendment. "During a year two or three cars might pass over every mile of railroad in one state while hundreds constantly employed in another moved over lines of less total length." The opinion does not make clear whether the court means to condemn the mileage rule universally in favor of all car companies or only in favor of those who can show that it operates unreasonably in their particular case. It is recognized that it may be applied to a telegraph company.²³

B. State Police Power and Interstate Commerce

Several cases involved alleged conflict between attempted enforcement of state inspection or pure food laws and congressional legislation or the constitutionally guaranteed immunity of interstate commerce from state interference. *Corn Products Refining Co. v. Eddy*²⁴ sustained an order of the Kansas board of health requiring plaintiff to state on each can of syrup the percentage of each ingredient of which it was composed "not only when sold and offered for sale in domestic commerce, but also while in the hands of the importing dealers for sale in the original packages, and hence, in contemplation of law, still in the course of commerce from state to state." Congress had prohibited the misbranding of foods shipped in interstate commerce but had not required a statement of their ingredients. On the authority of *Savage v. Jones*²⁵ it was held that the state law forbade nothing that Congress had sanctioned and interfered with no federal requirement, but dealt with something that Congress had left untouched. The same precedent, following earlier ones, had sustained the power of the state to require the disclosure of the ingredients of food products even when contained in the original package introduced from another state.²⁶

²³ In *Watters v. Michigan*, (1918) 248 U. S. 65, 39 Sup. Ct. 29, it was conceded by appellant that the peddling of two small articles at rest in the state before the sale was not protected from state taxation by the federal Constitution even though the great bulk of the business was interstate, but it was urged that the application of the state law should be determined by the general course of business and not by an isolated transaction. Mr. Justice Holmes said that the argument had force, but that its denial by the state court was not reviewable by the Supreme Court.

²⁴ (1919) 249 U. S. 427, 39 Sup. Ct. 325.

²⁵ (1912) 225 U. S. 501, 32 Sup. Ct. 715.

²⁶ Two cases dealing with state inspection of illuminating oils while still under the protection of the commerce clause have already been considered. See footnotes 11 and 12, *supra*.

Weigle v. Curtice Brothers Co.²⁷ and Hebe Co. v. Shaw²⁸ held that the federal Pure Food and Drug Act in no way affected the power of the state to forbid intrastate sales of food products originating in other states. The contention to the contrary was based on McDermot v. Wisconsin²⁹ which sanctioned the power of Congress to require the retention of labels on goods shipped in interstate commerce even after the commerce is over and the original package has been broken, and which denied the power of the states to make the retention of such labels unlawful. "But all this," remarks Mr. Justice Holmes, "has nothing to do with the question when interstate commerce is over and the articles carried in it have come under the general power of the State." After saying that the federal act "indicates its intent to respect the recognized line of distinction between domestic and interstate commerce," he adds that "it naturally would, as the distinction is constitutional," thus implying that the power of the state over domestic sales could not be interfered with by Congress except to prevent state interference with the enforcement of federal regulations governing interstate shipment. The Weigle case sustained state prohibitions against local sales of food products containing benzoic acid or benzoates even though shipped from other states in full compliance with the federal law. The Hebe case dealt similarly with condensed milk unless made from full cream milk.

In Merchants' Exchange v. Missouri³⁰ the United States Grain Standards Act was held not to preclude a state from prohibiting any one but a state weigher from issuing weight certificates for grain weighed at a public warehouse, since the federal law related exclusively to standards of quality and condition. The contention that the state requirement, as applied to grain received from or shipped to points without the state, burdens interstate commerce received from Mr. Justice Brandeis the terse answer: "It clearly does not." Other federal acts which were conceded to contain some reference to weighing were said to manifest the purpose of Congress to cooperate with state acts and not to supersede them.³¹

²⁷ (1919) 248 U. S. 285, 39 Sup. Ct. 124.

²⁸ (1919) 248 U. S. 297, 39 Sup. Ct. 125.

²⁹ (1913) 228 U. S. 115.

³⁰ (1919) 248 U. S. 365, 39 Sup. Ct. 114.

³¹ In Louisville & N. R. Co. v. Western Union Tel. Co., (1919) 250 U. S. 316, 39 Sup. Ct. 513, a state grant of the right of eminent domain to put poles on a railroad right of way was held not to be precluded by the acts of Congress authorizing the erection of such poles along post roads.

In two cases the Carmack Amendment was found not to preclude the exercise of the state power in question. In *Missouri, K. & T. Ry. Co. v. Sealy*³² the cause of action arose prior to the enactment of the federal statute and it was held that the right of one holding an interest in a bill of lading against the carrier which had issued it without receiving the goods for shipment was governed by the law of the state. State law was also held to be controlling in *Chicago, R. I. & P. Ry. Co. v. Maucher*³³ which was a suit by one of the employees of Barnum & Bailey's circus against an interstate railroad on account of personal injuries received. The Carmack Amendment was declared to have no application to the controversy, since Congress had dealt only with the shipment of property and not with that of persons. Moreover it was found that under the contract between the circus and the railroad, the latter was not acting as a common carrier, and that therefore the injured employee of the circus must base his claim, not upon a contract of carriage, but upon the general right of a human being not to be injured by the negligence of another.

Another circus case came before the court in *Southern Pacific Co. v. Arizona*.³⁴ The road had disobeyed an order of the state commission to carry the show at a designated rate between two Arizona points. It defended a prosecution for contempt on the ground that the state commission was without jurisdiction because the proposed train movement was interstate, since the show was on a tour from Texas, through Arizona and New Mexico into California. The court found, however, that on the date of the order the interstate transportation into Arizona was at an end and no other transportation had then been contracted for. The mere intention to leave the state later did not convert the contemplated intrastate movement into one that was interstate. The reasoning on which the decision is based gives some ground for the inference that the halting movements of a traveling exhibition might under certain circumstances be regarded as a single journey whose entire character would be interstate if the beginning and the end were in different states.

In two other cases state rates were held applicable because the movement in question was not interstate. *Arkadelphia Milling Co. v. St. Louis Southwestern Ry. Co.*³⁵ dealt with transportation of logs

³² (1919) 248 U. S. 363, 39 Sup. Ct. 97. See 17 *Michigan Law Review* 420.

³³ (1919) 248 U. S. 359, 39 Sup. Ct. 108.

³⁴ (1919) 249 U. S. 472, 39 Sup. Ct. 313.

³⁵ (1919) 249 U. S. 134, 39 Sup. Ct. 237.

from a forest to a mill, both in Arkansas. The fact that experience showed that ninety-five per cent of the finished product was shipped from the mill to points in other states was held insignificant. The distinction between the case and those³⁶ in which under somewhat similar states of facts the federal antitrust law has been held applicable was declared to be "so evident that particular analysis may be dispensed with."

In *Public Utilities Commission v. Landon*³⁷ a natural gas company which piped gas across state lines and sold it to distributing companies which sold it to consumers complained that the rates fixed for the distributing companies were unreasonably low and were also unwarranted interferences with interstate commerce. But the Supreme Court held that the interstate movement ended when the gas passed into the local lines, and that the rates fixed for the distributing companies were no concern of the producing company. The fact that the charges of the latter were a percentage of the gross amount received by the former was said not to make the sales to consumers an integral part of the interstate business, particularly since the contracts between the two companies were capable of alteration.

One of the complaints urged in *Denver & Rio Grande R. Co. v. Denver*³⁸ against an order of a state commission compelling the vacating of a track on the public street was that it interfered unduly with interstate commerce and amounted to an unconstitutional regulation thereof. But the Supreme Court found to the contrary in view of the fact that the track was not on the main line but served only a few industries which could be reached in other ways.

*Carey v. South Dakota*³⁹ which sustained a state prosecution for shipping wild ducks has already been referred to for its bearing on the constitutionality of the federal Migratory Bird Law. The power of the state to apply its prohibitions to interstate transit was sustained on the authority of *Geer v. Connecticut*.⁴⁰ The clause in the federal law declaring that such birds shall be deemed within the protection and custody of the United States was held to extend that custody and protection only to prohibiting their destruction contrary to federal regulations, and therefore not to preclude state laws aimed also at their preservation.

³⁶ *Texas & N. O. R. Co. v. Sabine Tram Co.* (1913) 227 U. S. 111, and cases cited.

³⁷ (1919) 249 U. S. 236, 39 Sup. Ct. 268. See 32 *Harvard Law Review* 860.

³⁸ (1919) 250 U. S. 241, 39 Sup. Ct. 450.

³⁹ (1919) 250 U. S. 118, 39 Sup. Ct. 403, note 10, *supra*.

⁴⁰ (1896) 161 U. S. 519, 16 Sup. Ct. 600.

II. THE WAR POWER

In two important cases the court decided that the statutes under which the President was authorized to take control of the railroads, telephones and telegraphs during the war conferred power to fix intra-state as well as interstate rates. In *Northern Pacific Ry. Co. v. North Dakota*,⁴¹ which involved railroad rates, the parties had raised only the question of the interpretation of the statute, but the opinion of the Chief Justice is assumed by the Chief Justice in his opinion in the telephone case to pass on the constitutional question as well. There is a back-handed implication in the opinion in the railroad case that the constitutional issue could not be waived by the parties, for, after observing that the court puts the constitutional issue temporarily out of view, the Chief Justice adds: "We say temporarily, since even upon the assumption that issues concerning them necessarily inhere in the cause and cannot be waived by the parties, we could not decide concerning such issues without interpreting the statute, which we proceed to do." In the process of interpretation it is laid down: "The complete and undivided character of the war power of the United States is not disputable. . . . To interpret, therefore the exercise of the power by a presumption of the continuance of a state power limiting and controlling the national authority was but to deny its existence. It was akin to the contention that the supreme right to raise armies and use them in case of war did not extend to directing where and when they should be used."

That this language was designed to pass on the constitutional issue not raised by the parties is apparent from the statement in *Dakota Central Telephone Co. v. South Dakota*⁴² decided the same day. In sustaining the power to take over the telephones and telegraphs and to fix all rates, the Chief Justice says: "That under its war power Congress possessed the right to confer upon the President the authority which it gave him we think needs nothing here but statement, as we have disposed of that subject in the North Dakota railroad rate case." To this he added: "And the completeness of the war power under

⁴¹ (1919) 250 U. S. 135, 39 Sup. Ct. 502.

⁴² (1919) 250 U. S. 163, 39 Sup. Ct. 507. Other cases deciding the same issues are *Burleson v. Dempsey*, (1919) 250 U. S. 191, 39 Sup. Ct. 511, *Macleod v. New England Tel. & Tel. Co.*, (1919) 250 U. S. 195, 39 Sup. Ct. 511, and *Kansas v. Burleson*, (1919) 250 U. S. 188, 39 Sup. Ct. 512. For an article on the interpretation of the statute, published prior to these decisions, see H. W. Bickle, "State Power over Interstate Railroad Rates During Federal Control," 32 *Harvard Law Review* 299.

which the authority was exerted and by which completeness its exercise is to be tested suffices, we think, to dispose of the many other objections urged as to the want of power in Congress to confer upon the President the authority which it gave him."

To the contention that the President exceeded the power given "because there was nothing in the conditions at the time the power was exercised which justified the calling into play of the authority," the answer is made that "as the contention at best concerns not a want of power, but a mere excess or abuse of discretion in exerting a power given, it is clear that it involves considerations which are beyond the reach of judicial power." What this means is open to debate. It may mean that whatever Congress calls an exercise of the war power is an exercise of the war power. It may mean that if there are any conceivable circumstances under which a statute or proclamation would be an exercise of the war power, it is an exercise of the war power whatever the circumstances may be. Or it may mean only that the complete control of railroads and telegraphs is plainly an exercise of the war power quite apart from any other circumstances than the existence of a state of war. In the telephone case Mr. Justice Brandeis dissented, without opinion. In the railroad case he confined his concurrence to the result. Of both cases it may be said that the result is more satisfying than the opinions.

The war power was found sufficient in *McKinley v. United States*⁴³ to sustain the order of the secretary of war forbidding houses of ill fame within five miles of an army post. The authority of Congress to regulate for the health and welfare of the army was said to be "too well settled to require more than the statement of the proposition" and the regulation in question was found obviously related to the health and efficiency of the troops.

Three cases⁴⁴ sustaining convictions under the Espionage Act plainly sanction the proposition that Congress under the war power may forbid the making of remarks which tend to interfere with the raising of the army either by enlistment or the draft. The issue in the cases was the degree of the relation between the remarks and the danger of the interference sought to be prevented by the statute. The questions considered in the opinions will be dealt with in a later section dealing with immunities of persons charged with crime.

⁴³ (1919) 249 U. S. 397, 39 Sup. Ct. 324.

⁴⁴ *Schenck v. United States*, (1919) 249 U. S. 47, 39 Sup. Ct. 247, *Frohwerk v. United States*, (1919) 249 U. S. 204, 39 Sup. Ct. 249, *Debs v. United States*, (1919) 249 U. S. 211, 39 Sup. Ct. 252.

III. MISCELLANEOUS FEDERAL POWERS

Though the question in *Alaska Pacific Fisheries v. United States*⁴⁵ seemed to be the construction of the words "the body of lands known as the Annette Islands" in an Act of Congress creating a reservation for Indians, Mr. Justice Van Devanter observed that in reaching the construction it is important to have in mind the power of Congress in the premises and declared that Congress had the "power to make the reservation inclusive of the adjacent waters and submerged land," since "all were the property of the United States and within a district where the entire dominion and sovereignty rested in the United States and over which Congress had complete legislative authority."

In *Ruddi v. Rossi*⁴⁶ the power of Congress to dispose of public lands was held to carry with it authority to exempt such lands after conveyance in fee simple to private owners from any attachment for debts contracted prior to the issue of the patent. Mr. Justice Holmes dissented because he was unable to see how Congress could extend its control beyond the time when its ownership was at an end. He insisted that "the statute must operate, if at all, purely by way of legislation, not as the qualification of the grant," and thought that a previous law could not affect the land in any way that a subsequent one could not. But he added with combined resignation and regret: "I am aware that my doubts are contrary to manifest destiny and to a number of decisions in the State Courts. I know also that when common understanding and practice have established a way it is a waste of time to wander in bypaths of logic."

Another instance in which Congress was allowed to prolong its control beyond the time when the major incidence of the control had ended appears in *Capital Trust Co. v. Calhoun*⁴⁷ in which a restriction in an appropriation as to the amount which attorneys for the beneficiaries might receive from the proceeds was applied to defeat a claim of such attorneys against the estate of the deceased beneficiary which was being administered in a state court. It chanced that the estate consisted entirely of the funds received from the government, so that the decision did not involve the power of Congress over funds received from other sources.

⁴⁵ (1919) 248 U. S. 78, 39 Sup. Ct. 40.

⁴⁶ (1918) 248 U. S. 104, 39 Sup. Ct. 46. See 19 *Columbia Law Review* 159, 4 *Cornell Law Quarterly* 50, 32 *Harvard Law Review* 721, and 28 *Yale Law Journal* 283.

⁴⁷ (1919) 250 U. S. 208, 39 Sup. Ct. 486. For a note on an earlier case in the District of Columbia on the same question, see 17 *Columbia Law Review* 483.

An important question of legislative procedure was settled in *Missouri Pacific Ry. Co. v. Kansas*⁴⁸ which held that the word "House" in the clause requiring a two-thirds vote in each house for passing a bill over the President's veto means not the entire membership but the quorum which is sufficient to entitle the house to proceed to the original passage of the bill by a majority vote. If a majority of all the members is present, a bill may be passed over a veto by two-thirds of those present. In reaching the decision the court attached great weight to legislative practice in submitting constitutional amendments by a vote of two-thirds of a quorum but not two-thirds of the entire membership and referred to "the identity between the provision . . . giving the power by a two-thirds vote to submit amendments, and the requirements . . . as to the two-thirds vote necessary to override a veto" which "makes the practice as to the one applicable to the other." The practice of submitting amendments by a vote of less than two-thirds of the entire membership was found to have been approved by the first Congress in the submission of the first ten amendments. In emphasizing the importance of this early legislative construction, the Chief Justice observed: "When it is considered that the chairman of the committee in charge of the amendments was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated."

IV. GOVERNMENTAL RELATIONS BETWEEN THE STATES AND THE UNITED STATES

It is surprising that the question decided in *Bank of California v. Richardson*⁴⁹ had not been raised and settled previously. The stockholders of a national bank claimed that the assessment of their shares for state taxation should exclude such part of their value as was contributed by the shares of state and national banks owned by the bank of which they were stockholders. The Supreme Court agreed that no

⁴⁸ (1919) 248 U. S. 276, 39 Sup. Ct. 93. See 28 *Yale Law Journal* 415.

⁴⁹ (1919) 248 U. S. 476, 39 Sup. Ct. 165. See also *Bank of California v. Roberts*, (1919) 248 U. S. 497, 39 Sup. Ct. 171. See 19 *Columbia Law Review* 59, 32 *Harvard Law Review* 727, 3 *Minnesota Law Review* 257, and 28 *Yale Law Journal* 610.

deduction should be made on account of the shares in a state bank, but the majority held that the value of the shares of the national bank should be deducted. The reason given was that the power of the state to tax national bank stock was wholly dependent upon congressional permission, that the permission was confined to a single tax on the interest of the stockholder, and that the shares were in effect taxed twice if they were taxed to the national bank which owned them and then entered again into the assessment of the shares in the owner bank. The minority, consisting of Justices Pitney, Brandeis and Clarke, insisted that it was well established that the interest of a stockholder in a national bank was taxable without regard to the character of the investments held by the bank, and saw no reason why investments in other national banks should be deducted in making the assessment when investments in United States bonds can be included. It found nothing in the congressional statute which required the deduction and brought to bear the conventional distinction between the property of the shareholder and the property of the bank.

*Chesapeake & Delaware Canal Co. v. United States*⁵⁰ applied the established rule that the United States when asserting sovereign or governmental rights is not subject to state statutes of limitations.⁵¹

V. POLICE POWER

The modern development of the police power renders it difficult to classify present day cases under the familiar categories of health, safety and morals. The same statute often has several purposes and protects different interests. Restrictions on the sale of food products, for example, pass beyond the prevention of disease and aim to satisfy the curiosity of the consumer and to protect the farmer from unwelcome competition from synthetic products. Control of the relations between employer and employee transcends the primary requirements of health and safety and has something to do with conceptions of fair

⁵⁰ (1919) 250 U. S. 123, 39 Sup. Ct. 407.

⁵¹ *Cavanaugh v. Looney*, (1919) 248 U. S. 453, 39 Sup. Ct. 142, recognized the familiar rule that a federal court may enjoin proceedings by state officials in violation of the federal Constitution, but, in applying the subsidiary rule that this should not be done except in a case reasonably free from doubt and when necessary to prevent great and irreparable injury, denied relief.

In *Barrett v. Virginian Ry. Co.*, (1919) 250 U. S. 473, 39 Sup. Ct. 540, Mr. Justice McReynolds remarked *obiter* that the rule of the federal courts as to directing verdicts is not subject to modification by state statutes and constitutions.

dealing. Regulation of commercial intercourse is no longer confined to prevention of the types of fraud known at common law. Public convenience is a well-recognized justification for impositions on those engaged in enterprises known as public utilities. Most of the current decisions on the police power may be conveniently put under one of the three heads of commercial intercourse, industrial relations, and public utilities. A few which could not be put under commercial relations without undue squeezing have in common the control of physical conditions. Obviously these classifications are not mutually exclusive and will not bear rigid scientific scrutiny. Such merit as they have, if any, is mainly that of convenience.

PHYSICAL CONDITIONS

Both safety and health lay behind the statute sustained in *Perley v. North Carolina*⁵² which required any one cutting timber within four hundred feet of a watershed owned by a municipality to remove waste parts so as to prevent the spread of fire and consequent danger to the watershed. The fact that similar neglects on the part of the municipality did not constitute a violation of the statute was held not to constitute an illegal discrimination under the equal-protection clause.

Safety was the obvious justification for the ordinance approved in *Pierce Oil Corporation v. Hope*⁵³ which forbade "the storing of petroleum, gasoline, etc. within three hundred feet of any dwelling, beyond certain small quantities specified." The court refused to regard the complainant's praise of the safety of its tanks as confessed by the city's demurrer and added that "if it were true that the necessarily general form of the law embraced some innocent object, that of itself would not be enough to invalidate it or to remove such an object from its grasp." It was hinted, however, that special circumstances might induce the court to make an exception, but none were found in the case at bar.

Aesthetic considerations as a justification for restrictions on the use of property made some slight progress towards recognition in *St. Louis Poster Advertising Co. v. St. Louis*,⁵⁴ which sustained an ordinance limiting the area of billboards to 400 square feet, their height

⁵² (1919) 249 U. S. 510, 39 Sup. Ct. 357.

⁵³ (1919) 248 U. S. 498, 39 Sup. Ct. 172.

⁵⁴ (1919) 249 U. S. 269, 39 Sup. Ct. 274. See 28 *Yale Law Journal* 835.

above ground to 14 feet, requiring a space of 4 feet between them and the ground, and forbidding them nearer than 6 feet to a building or the side of the lot, or nearer than 2 feet to each other or 15 feet to the street. The company appeared to have eliminated dangers from wind and fire, but Mr. Justice Holmes observed that such dangers "are or may be the least of the objections adverted to in the cases," and added: "Possibly one or two details, especially the requirement of conformity to the building line, have aesthetic considerations in view more obviously than anything else. But as the main burdens imposed stand on other ground, we should not be prepared to deny the validity of relatively trifling requirements that did not look solely to the satisfaction of rudimentary wants that alone we generally recognize as necessary." The *Thomas Cusack* case⁵⁵ was referred to as standing for the power to prohibit billboards altogether in residence districts, so that they seem to be doomed so far as the federal Constitution is concerned. Of the fee charged by St. Louis for permits to erect the authorized billboards, the court remarked that "if the city desired to discourage billboards by a high tax we know of nothing to hinder, even apart from the right to prohibit them altogether. . . ."

A statute of Georgia prohibiting the possession of more than one gallon of intoxicating liquor came before the court in *Barbour v. Georgia*.⁵⁶ The state court had assumed that the liquor was acquired between the enactment of the statute and the time when its prohibition became effective, and the Supreme Court held that property thus acquired is taken with full notice of its infirmity and that its mere possession may by lapse of time become a crime. One can no more stay the exercise of the state's police power by acquiring property under such circumstances than by making a contract. An objection that the law could not be applied to liquor acquired before its enactment was found not to be properly raised, and the court declared that on that issue no opinion was expressed.

COMMERCIAL INTERCOURSE

It may be suspected that the votes of farmers had something to do with two statutes imposing restrictions on the sale of food which successfully ran the gauntlet of the due-process clause. That sus-

⁵⁵ *Thomas Cusack Co. v. Chicago*, (1917) 242 U. S. 526, 12 *American Political Science Review* 442.

⁵⁶ (1919) 249 U. S. 454, 39 Sup. Ct. 316. See 17 *Michigan Law Review* 709 and 28 *Yale Law Journal* 836.

tained in *Hebe Co. v. Shaw*⁵⁷ forbade the sale of any condensed milk not made from unadulterated full cream milk. The minority consisting of Justices Day, Van Devanter and Brandeis thought that the statute did not apply to the plaintiff's product which was labeled "Hebe; A Compound of Evaporated Skimmed Milk and Vegetable Fat; Contains 6% Vegetable Fat, 24% Solids; For Coffee and Cereals, For Baking and Cooking." The majority, however, took the view that condensed skimmed milk was forbidden in every form, however labeled and whatever ingredients were added. It seemed to be conceded that the product was not unwholesome, but it was thought that fraudulent palming off was not necessarily prevented because the label told the truth, since the consumer in many instances never sees the label. On the constitutional question Mr. Justice Holmes observed: "The purposes to secure a certain minimum of nutritive elements and to prevent fraud may be carried out in this way even though condensed skimmed milk and Hebe should both be admitted to be wholesome. The power of the legislature 'is not to be denied simply because some innocent articles or transactions may be found within the proscribed class.' . . . The answer to the inquiry is that the provisions are of a kind familiar to legislation and often sustained and that it is impossible for this Court to say that they might not be believed to be necessary in order to accomplish the desired ends."

The Kansas statute sustained in *Corn Products Refining Co. v. Eddy*⁵⁸ was less drastic. The plaintiff was required to state the ingredients of a compound which in full compliance with the federal law it had labeled "Mary Jane. A Table Syrup Prepared from Corn Syrup, Molasses and Pure Country Sorghum. Contains Sulphur Dioxide." To the complaint that the disclosure of the ingredients and their proportions in a wholesome product made under a secret formula was a denial of due process, Mr. Justice Pitney answered: "Evidently the purpose of the requirement is to secure freedom from adulteration and misbranding; the mischief of misbranding being that purchasers may be misled with respect to the wholesomeness or food value of the compound. And it is too plain for argument that a manufacturer or vendor has no constitutional right to sell goods without giving to the purchaser fair information of what it is that is being sold. The right of a manufacturer to maintain secrecy as to his

⁵⁷ (1919) 248 U. S. 297, 39 Sup. Ct. 125, footnote 28, *supra*. See 28 *Yale Law Journal* 512.

⁵⁸ (1919) 249 U. S. 427, 39 Sup. Ct. 325, footnote 24, *supra*.

compounds and processes must be held subject to the right of the state, in the exercise of its police power and in promotion of fair dealing, to require that the nature of the product be fairly set forth."

The prevention of fraud and the facilitation of commercial transactions were the justifications adduced by Mr. Justice Brandeis in *Merchants' Exchange v. Missouri*⁵⁹ for a statute which restricted the issuing of weight certificates for grain to duly authorized and bonded state weighers. The limitation of the provision to grain and hay was held not to be an arbitrary discrimination against dealers in those articles. *Payne v. Kansas*⁶⁰ found no constitutional flaw in a Kansas statute which forbade the sale of farm produce on commission without an annual license, to be procured from the State Board of Agriculture upon a proper showing as to character, responsibility, etc., and a bond conditioned to make honest accounting. The issue was thought to be so simple that it was disposed of in a memorandum opinion.

Two statutes regulating insurance agents and brokers met with unanimous approval. The South Carolina law complained of in *La Tourette v. McMaster*⁶¹ defined an insurance broker "to be such person as shall be licensed by the insurance commissioner to represent citizens" in securing policies. No one could receive a license unless he was a resident of the state and had been a licensed insurance agent of the state for at least two years. The alleged impairment of the privileges and immunities of citizens of the several states was answered by pointing out that the requirement of residence was not identical with that of citizenship and that there might be reason to think the business would be best conducted by residents. The business of insurance was declared to be clothed with a public interest, and it was said to follow that "those engaged in it or who bring it about are affected with the same interest and subject to regulation as it is." The fidelity of an insurance broker to both insured and insurer was said to be a proper concern of the state and the means devised to secure it were thought appropriate.

The statute sustained in *American Fire Insurance Co. v. King Lumber & Mfg. Co.*⁶² ordained that the person who solicits insurance and procures applications shall be deemed the agent of the insurer notwithstanding anything in the policy to the contrary. The statute

⁵⁹ (1919) 248 U. S. 365, 39 Sup. Ct. 114, footnote 30, *supra*.

⁶⁰ (1918) 248 U. S. 112, 39 Sup. Ct. 32.

⁶¹ (1919) 248 U. S. 465, 39 Sup. Ct. 160. See 28 *Yale Law Journal* 601.

⁶² (1919) 250 U. S. 2, 39 Sup. Ct. 431.

was on the books when the business involved in the suit was transacted, and Mr. Justice McKenna reminded the company of this, so that it is not certain that the statute would be applied retroactively. The company's "attempt at rejection" was said to suggest that the purpose of the statute "was to preclude confusion and dispute as to the relation of the broker to the parties respectively, and to preclude an underwriter, after using an agency, from denying responsibility."

INDUSTRIAL RELATIONS

*Dominion Hotel v. Arizona*⁶³ sustained the conviction of a hotel keeper for not confining the eight-hour working period of an employee to a period of twelve hours and rejected his complaint that he was denied the equal protection of the laws by the provision in the statute exempting from the twelve-hour limit railroad restaurants and eating houses on railroad rights of way operated by or under contract with the railroad company. After remarking that "the Fourteenth Amendment is not a pedagogical requirement of the impracticable," Mr. Justice Holmes added that the state "may do what it can to prevent what is deemed an evil and stop short of those cases in which the harm to the few concerned is thought less important than the harm to the public that would ensue if the rule laid down were mathematically exact." So long as the theory of the distinction adopted by the state is justifiable, "the fact that some cases, including the plaintiff's, are very near to the line makes it none the worse. That is the inevitable result of drawing a line where the distinctions are distinctions of degree; and the constant business of the law is to draw such lines."

In *Middleton v. Texas Power and Light Co.*⁶⁴ an injured employee who had been denied recovery at common law on the ground that his sole remedy was under the workmen's compensation act complained under the equal-protection and the due-process clauses, but without success. The statute made it optional with the employer to subscribe to the state fund, required subscribing employers to notify their employees, and confined the remedy of such employees to the graded compensation stipulated by the act. To the lament that the employer had a choice whether to come under the act while the employee had not, Mr. Justice Pitney answered that the former accepts by becoming a subscriber while the latter accepts by remaining in the employer's

⁶³ (1919) 249 U. S. 265, 39 Sup. Ct. 273.

⁶⁴ (1919) 249 U. S. 152, 39 Sup. Ct. 227. See 28 *Yale Law Journal* 599.

service and that each has the opportunity to choose. The loss by the employee of the right to contract with a subscribing employer outside the terms of the act was justified by saying that no one has a vested right to have the rules of law remain unchanged for his benefit, and that compensation laws compulsory on both employer and employee had been previously sustained. The employee complained also because he was discriminated against in favor of other employees who retained their common-law remedies, but all the distinctions were held reasonable. These included the exemption or exclusion of farm laborers, domestic servants, those who worked for a nonsubscribing employer or for one having less than five employees, cotton-gin laborers and railroad employees. The justification for the latter distinction was said to be the existence of the federal Employers' Liability Law and the difficulty of determining in particular instances whether an employee was engaged in interstate commerce at the time of his injury and therefore excluded from the operation of a state compensation law.

It was the employer who objected to the Arizona employers' liability law, sustained in *Arizona Employers' Liability Cases*⁶⁵ by a vote of five to four. This differed from the usual compensation law in that the employee, instead of getting a statutory compensation from a commission, had the damages for his injury assessed by a jury. The employer insisted that it was unconstitutional to impose on him liability without fault unless the amount that could be recovered was restricted. This view was shared by Justices McKenna and McReynolds in their separate dissenting opinions, in which the Chief Justice and Mr. Justice Van Devanter concurred. But Mr. Justice Pitney for the majority pointed out it was not true that the responsibility of the employer was unlimited except as it is true of every action for compensatory damages tried before a jury. The objection that juries are prone to render extravagant verdicts was met by referring to the corrective in the authority of the court to set aside an exorbitant verdict and by saying that it was a contradiction in terms to posit a denial of due process in the submission of a controversy between litigants to the established courts, "there to be tried according to long established modes and with a constitutional jury to determine the issues of fact and assess compensatory damages. . . ." Mr. Justice Holmes in a separate concurring opinion, in which Justices Brandeis and Clarke joined, pointed out that other statutes had put on the employer the risk of what the employee might do and had been

⁶⁵ (1919) 250 U. S. 400, 39 Sup. Ct. 553.

found not to offend the Constitution, and that the criterion of fault to which the employer claimed himself entitled was an external standard, applied by a jury, "which the defendant has to satisfy at his peril and which he may miss after giving the matter his best thought." Of the public policy justifying the statute he said: "There is no more certain way of securing attention to the safety of the men, an unquestionably constitutional object of legislation, than by holding the employer liable for accidents."

PUBLIC UTILITIES

Several minor complaints of carriers may be treated briefly. *Denver & Rio Grande R. Co. v. Denver*⁶⁶ found no lack of due process in requiring the removal of a side track from the highway when the road had other means of reaching the desired goal, the existing tracks menaced safety, and removal was less burdensome to the road than building a tunnel or viaduct would be. *Chicago & N. W. Ry. Co. v. Ochs*⁶⁷ sustained an order requiring the extension of a side track, partly at the expense of the carrier, from the main line to a manufacturing plant, the same being not merely a private siding, but additional trackage for public use, and wholly under the control of the carrier. *Lake Erie & W. R. Co. v. State Public Utilities Commission*⁶⁸ approved an order to restore a similar track which the road had removed. The circumstances of each case were such that the respective orders were deemed reasonable and therefore not takings of property without due process nor for a public use without just compensation.

*Detroit & M. R. Co. v. Fletcher Paper Co.*⁶⁹ withheld comfort from a carrier which complained that the state denied it opportunity to contest the reasonableness of rates in proceedings brought by shippers for overcharge. Such opportunity had been offered and availed of in prior proceedings and the court declared that "there is nothing to hinder a State from providing that after a judicial inquiry into the validity of such an order it shall be binding upon the parties until changed."

Of much greater importance were three cases on the question of reasonable rates. *Lincoln Gas & Electric Light Co. v. Lincoln*⁷⁰ sus-

⁶⁶ (1919) 250 U. S. 241, 39 Sup. Ct. 450, footnote 38, *supra*.

⁶⁷ (1919) 249 U. S. 416, 39 Sup. Ct. 343.

⁶⁸ (1919) 249 U. S. 422, 39 Sup. Ct. 345.

⁶⁹ (1918) 248 U. S. 30, 39 Sup. Ct. 13.

⁷⁰ (1919) 250 U. S. 256, 39 Sup. Ct. 454.

tained the findings of the master that the rates fixed were not confiscatory, because on all the evidence and having regard to the entire period under investigation and in the absence of a practical test the Supreme Court was unable to say that he was wrong. The evidence is not set forth, so that the approval of the master's findings does not shed new light on the law of rate regulation. Mr. Justice Pitney, however, stated specifically that the court disapproved of the "finding that no rate yielding as much as 6 per cent upon the invested capital could be regarded as confiscatory," since 8 per cent was the lowest rate sought and generally obtained in the community for money invested in banking and mercantile enterprises, and the "legal rate" in the state was 7 per cent. "Complainant had not such a monopoly nor were its profits 'virtually guaranteed' in such a sense as to permit the public authorities to restrict it to a return of 6 per cent upon its invested capital." It is to be noted that the reference is to "invested capital" and not to the present "fair value" of the plant. The opinion therefore does not show that the Supreme Court is disposed to deny that 6 per cent is a "fair return on fair value."

In sustaining the dismissal of the bill, the Supreme Court was careful to order it modified so as to leave the complainant a chance to try again if later operations brought forth different results, though Mr. Justice Pitney observed that "perhaps it would go without saying." This shows plainly enough that a decree holding rates not confiscatory is not *res adjudicata* as to the future. After remarking that it is common knowledge that the cost of labor and supplies has greatly advanced, Mr. Justice Pitney added: "And it is equally well known that annual returns upon capital and enterprise the world over have materially increased, so that what would have been a proper rate of return for capital invested in gas plants and similar public utilities a few years ago furnishes no safe criterion for the present or for the future." Here are hints of little less importance than explicit adjudications.

What Mr. Justice Clarke in dissenting called "the novel doctrine of the Denver Union Water Company Case" was reaffirmed by a divided court in *Detroit United Ry. Co. v. Detroit*.⁷¹ A street railway company, whose franchise on certain streets had expired and which concededly might have been forbidden to operate and required to remove its tracks, brought a bill to enjoin the city from enforcing an ordinance regulating its fares. It alleged that the enforcement

⁷¹ (1919) 248 U. S. 429, 39 Sup. Ct. 151. See 19 *Columbia Law Review* 153, 32 *Harvard Law Review* 736, and 17 *Michigan Law Review* 347.

of the ordinance would result in a deficit in operations, and under the pleadings this allegation was taken as confessed by the city. The majority held, as in the Denver case,⁷² that the ordinance in effect amounted to a grant to the road to continue operations and that for this public service the company was entitled to a fair return on its investment. Mr. Justice Day stated that the city "elected to require maintenance of the public service," but the ordinance as quoted on the margin contains no such requirement, but merely forbids those operating street railroads to charge more than the designated fares. Plainly the so-called requirement is a matter of inference from the imposition of rates plus the failure to forbid operations. For the minority, consisting of himself and Justices Holmes and Brandeis, Mr. Justice Clarke observed: "The utmost that can be claimed for the ordinance is that it suffers the company to use the streets which it could not use at all without it—for the company to use them in any other way than as thus permitted would be unlawful. Yet this mere offer of a naked privilege, in terms revocable at will, is held to give a constitutional right and at the same time to so violate that right as to render the ordinance invalid. I cannot bring myself to understand how, except by sheer assertion of power, even the apparent justice of the result which it is hoped thus to obtain can be made the basis for creating a constitutional right where no right whatever existed before the passing of this rejected ordinance."

The happy state of being without a franchise was sought by the complainant in *Columbus Ry. Power & Light Co. v. Columbus*,⁷³ but not attained. The company sought to enjoin the city from requiring it to continue service at the rates stipulated in its franchise which still had some years to run. Its unaccepted surrender of its franchise was held not to relieve it from the obligation of its contract to serve at the designated rates of fare, and the fact that such service would be unremunerative, which was confessed by the motion to dismiss, was held no excuse. The contention that the franchises were merely permissive was rejected by the court. The increase of costs due to an arbitral award of the war labor board raising the wages of employees was declared not to be a direct intervention of the government which excused performance by rendering it impossible. Such comfort as owners of street railroad securities can wrench from the case must be

⁷² (1918) 246 U. S. 178, 13 *American Political Science Review* 66.

⁷³ (1919) 249 U. S. 399, 39 Sup. Ct. 349. This case is followed in *Burr v. Columbus*, (1919) 249 U. S. 415, 39 Sup. Ct. 354. See 19 *Columbia Law Review* 241.

discovered in the remarks in the opinion that "there is no showing that the contracts have become impossible of performance" or "any allegation establishing the fact that taking the whole term together the contracts will necessarily be unprofitable." But such hopes as these expressions may raise must be somewhat dimmed by the reference to "the principle, frequently declared in decisions of this court, that if a party charge himself with an obligation possible to be performed, he must abide by it unless performance is rendered impossible by the act of God, the law, or the other party." To this was added: "Unforeseen difficulties will not excuse performance. Where the parties have made no provision for a dispensation, the terms of the contract must prevail."⁷⁴

(To be concluded)

⁷⁴ In *Public Utility Commissioners v. Manilla Electric R. & L. Co.*, (1919) 249 U. S. 262, 39 Sup. Ct. 272, the court found no constitutional question in a complaint by a public utilities commission that the territorial court had construed an ordinance requiring free transportation of members of the police department wearing official badges as not applicable to detectives with such badges concealed.